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Public Comments on the NYS Department of Labor's Proposed Rule on Pay Transparency in Job Advertisements, I.D. No. LAB-37-23-00003-P

Submitted via email to Regulations@labor.ny.gov

We submit these comments on behalf of PowHer New York; Legal Momentum, The Women's Legal Defense and Education Fund; the Communications Workers of America, Local 1180; and the National Employment Lawyers Association/NY.

We applaud the New York State Department of Labor ("DOL" or "Department") for its broad efforts to advance pay equity and engage in a consultative process towards meaningful implementation of New York State's vital new pay transparency law and are grateful for this opportunity to comment on the proposed rule (Subpart 194-2) on pay transparency in job advertisements.

PowHer New York, a network of over 100 diverse organizations collaborating to accelerate women's economic equity, has been a driving force behind New York's pro-women policy reform and leads New York's Equal Pay Campaign. Legal Momentum, The Women's Legal Defense and Education Fund, is the nation's first and longest serving civil rights organization dedicated to advancing women's rights and gender equality, including pay equity. The Communications Workers of America, Local 1180 has been fighting for equal treatment and opportunities for our members and the general public since 1965, including, but not limited to equal pay. NELA/NY, the local affiliate of the National Employment Lawyers Association, promotes the workplace rights of individual employees through legislation, a legal referral service, and other activities, with an emphasis on the special challenges presented by New York's employment laws.

Together our organizations played a central role in drafting and advocating for pay transparency protections in New York State, which for the first time require employers to disclose pay ranges

in advertisements for jobs, promotions, and transfer opportunities. Based on our research and direct experience advocating on behalf of women facing pay discrimination, our primary goal in enacting this legislation was to advance pay transparency to address longstanding practices that perpetuate pay inequity and devalue work disproportionately carried out by women and people of color.

While we express overall support for much of the guidance in the proposed rule, we strongly oppose the Department's current interpretation of what can constitute a "good faith" salary range. Specifically, we disagree with DOL's interpretation that employers are acting in "good faith" when they pay outside the range based on obtaining additional information during the hiring process or determine that a candidate "exceeds the expected qualifications." The Department's current interpretation, which provides broad leeway for employers to change salary after the fact, absent transparency, undermines the purpose and intent of the law, creating a loophole that eliminates transparency and encourages the types of discriminatory practices the law was designed to prevent. Moreover, we urge the Department to issue guidance that makes clear that all covered advertisements should include the compensation range, provide clarity on anti-retaliation protections under the law, and ensure that the public and organizations have a mechanism to report violations.

The Regulations Should Define "Good Faith" with Greater Specificity

We believe the Department should add more specificity to its definition of "good faith" under 194-2.3(f). Currently, the definition is "the range of compensation the employer legitimately believes they are willing to pay the successful applicant or employee at the time they post an advertisement." The addition of the term "legitimately," while welcome, is not enough to provide the clarity that workers and employers alike have sought. **We would urge the Department to define "good faith" as "the range of compensation the employer actually believes it will pay for a particular job based on factors such as relevant qualifications, the budgeted amount available for the position, applicable pay scale or compensation model relied upon by the employer, the actual range of compensation for those currently holding the position or equivalent positions, or other operational considerations."** The regulations should further specify that "the breadth of the wage range provided is one factor relevant to the analysis of whether the wage range has been set in good faith."

The DOL Should Remove Overbroad Language Authorizing Employers to Pay Outside the Disclosed Range and Instead Discourage this Practice Because It Facilitates the Type of Discriminatory Decision-Making the Law Specifically Sought to Curtail.

We are particularly alarmed by the overbroad language under 194-2.3(f), which states that an employer "is not precluded from adjusting the range of compensation *after collecting additional information* through the hiring process," yet provides no parameters for "additional information" and no guidance on how the adjusted range will be communicated to the applicant pool. We are likewise concerned by the Department's second illustrative example of employers engaging in

“good faith” actions, which provides that an employer can develop a range of compensation based on objective factors but can offer a rate of compensation above what was initially listed in the advertisement if the employer receives an application that exceeds the expected qualifications for the position. Together, this language creates a loophole that risks encouraging the discriminatory practices this law seeks to limit. While a leading goal of New York State’s pay transparency legislation is to reduce the role of bias by encouraging employers to price the job and not the person *when setting a compensation range*, the above language encourages employers to revert to pricing the person. **We urge the Department to exclude this language from the regulations and instead discourage employers from engaging in this practice, which, from our perspective, constitutes *bad faith*.**

True transparency creates an incentive for employers to price the job: to move away from making ad hoc, often discriminatory, candidate-specific decisions regarding pay and to instead develop fair and thoughtful pay schemes centered around objective factors like budget, skill, years of experience, and qualifications. Creating these incentives is essential since employers’ assessments regarding which candidates “exceed expectations” have historically been infused with gender and racial biases that result in lower pay for women and people of color. Based on the traditional, gendered assignment of caregiving responsibilities, employers are known to offer women less based on discriminatory biases that mark women as unreliable and less competent.¹ Conversely, employers are known to reward male candidates, who are less likely to take on these responsibilities, with higher salaries based on views of men as dependable breadwinners.² Workers of color, Black and Brown women in particular, must overcome additional biased assumptions about their work ethic, family responsibilities, and values, which result in employers offering lower pay.³

In a system in which prior salary has come to dictate future salary, this dynamic has set into play an ongoing cycle in which salaries for women and people of color continue to be artificially depressed based on biased notions about what an “exceptional” employee looks like.⁴ As a result of these discriminatory notions, women and people of color are offered less and make less, and typically carry those depressed salaries throughout their lives, often passing them on to future generations.

Moreover, despite New York’s existing salary history ban, research demonstrates that absent transparency, employers still find ways around it, focusing on salary expectations and voluntary

¹ Michelle J. Budig & Melissa Hodges, *Statistical Models and Empirical Evidence for Differences in the Motherhood Penalty across the Earnings Distribution: A Reply to Killewald and Bearak*, 79 Am. Socio. Rev. 358 (2014); Int’l Lab. Org., ACT/EMP Research note, *Breaking barriers: Unconscious gender bias in the workplace* 3-7 (Aug. 2017), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---act_emp/documents/publication/wcms_601276.pdf.

² *Id.*

³ Jocelyn Frye, Center for American Progress, *Racism and Sexism Combine to Shortchange Working Black Women* (Aug. 2019), <https://www.americanprogress.org/article/racism-sexism-combine-shortchange-working-black-women/>.

⁴ Robin Bleiweiss, Center for American Progress, *Why Salary History Bans Matter to Securing Equal Pay* (Mar. 2021), <https://www.americanprogress.org/article/salary-history-bans-matter-securing-equal-pay/>.

disclosures.⁵ Thus, one of the primary factors likely driving employers to offer a higher salary outside an anticipated range is their desire to recruit individuals who seek a higher salary based on their prior salary, a factor that is harder to account for when setting the range upfront yet known to entrench discriminatory biases and harm women and people of color.

Consider an example where an employer posts an announcement for the position of “Manager” and a pay range of \$100,000-\$125,000. The employer based this pay range on a budget that assumed the newly hired manager would earn in the same range as current employees in that position, all of whom happen to be female. The posting attracts some candidates, including a male friend of the hiring manager who meets the qualifications, is known to be competent, and volunteers that he is currently working in a similar role and earning \$150,000. Under DOL’s current guidance, the hiring manager is free to hire his former co-worker at a salary of \$150,000 because he did so based on collecting “additional information through the hiring process,” even though the additional information was not a legitimate basis to pay outside the range. This scenario is not uncommon based on our experience and perpetuates exactly the ill effects that the salary transparency bill was designed to avoid. The Department’s broad language authorizing employers to pay outside the range “after collecting additional information through the hiring process” thus provides no assurances that an employer is relying on legitimate factors rather than discriminatory ones or that the deviation is based on factors actually relevant to the job.

The Department’s language therefore risks facilitating the discriminatory practices that our pay transparency law and salary history ban collectively seek to eliminate. Given these underlying dynamics, we do not view the Department’s ground for paying outside the range as legitimate and the second illustrative example cannot be characterized as “good faith”. **We therefore request that the regulations exclude this example and alternatively discourage employers from paying outside the range based on perceived exceptional qualifications, which is not a legitimate basis to pay outside the range. Instead of uplifting this problematic practice as an example of “good faith,” we ask that the regulations encourage employers to set an accurate range upfront that takes into account the full range of relevant qualifications for the position and to include this information in the job description. The guidance should also make clear that employers should not pay outside the range except in narrow and legitimate circumstances that do not revolve around specific candidates. Since employers are not required to maintain documentation under the law, it is also essential that the regulations make clear that the burden rests on employers to establish that a challenged range is in good faith.**

⁵ See Laura Adler, *Expectations Penalty: Statistical Discrimination in Employer Responses to the Salary History Ban*, Academy of Management, Organizational Behavior, August 2023.

To Maintain Transparency, the Regulations Should Make Clear that Employers with a Legitimate Basis to Revise or Pay Outside the Original Range Reissue the Advertisement with the Revised Range.

The primary goal of this law is to advance transparency. However, under the proposed regulations, an employer can pay outside the range based on collecting information during the hiring process without disclosing this critical fact or revealing the revised compensation range. The natural consequence of this approach is to undermine transparency completely, making it impossible to know when an employer pays outside the posted range or if any pay range accurately reflects the pay that was ultimately offered. As a result, applicants, employees, and the public are once again in the dark about whether a posted range is accurate, what the true range is for a particular position, when and how often employers are paying outside the range, and whether they are actually doing so in “good faith.”

Under our previous example, the hiring manager can hire his friend at a salary of \$150,000, which exceeds the top range by \$25,000 and exceeds the pay rate of all existing female employees in that role without making any disclosures, thus completely undermining transparency. Allowing employers to change the range in this way obscures what the employer ultimately offered for the position, undermining transparency for existing employees and future applicants. It also creates an incentive for employers to place less effort into setting an accurate range upfront if they can easily pay outside that range later without scrutiny or disclosure.

To ensure that the regulations do not undermine transparency, the regulations should make clear that in any and all scenarios where an employer decides to offer outside the posted compensation range, they must first reissue the advertisement with the updated range. Allowing employers to change the range after the fact without this form of disclosure eliminates employer accountability and thwarts the ultimate goals of this law: transparency.

The Range of Compensation Should Always be Included in the Space Allotted for the Advertisement

Under §194-2.3(e), the proposed regulations provide that where “the range of compensation information is extensive such that it will not fit in the space allotted for the advertisement, the employer is permitted to provide such information in a separate attachment or addendum...” The compensation range is one of the most important and relevant factors for applicants and it is inherently not extensive because it can be communicated simply with at most two numbers in any medium, including Instagram or a help wanted sign. Allowing employers to link to or attach this information elsewhere only creates opportunities to bury the compensation range or to place the onus on candidates to seek it out. **The regulations should make clear that while the compensation range must be included in all forms of advertisement, information that is more extensive, such as the job description or additional information explaining the range,**

can be included in a link, attachment, or addendum that is free of charge and easily accessible.

The Regulations Should Make Clear that Retaliation is Prohibited

DOL’s fact sheets on the pay transparency law for employers and employees incorrectly refers to anti-retaliation protections that apply under a different law, stating “employers are prohibited from retaliating against employees who discuss their compensation with coworkers.” The pay transparency law creates new protections that broadly prohibit retaliation. It is essential that the regulations make clear that employers are prohibited from retaliating against any applicant or current employee for exercising their rights under *this* law, including seeking the compensation or range of compensation for a position or challenging the exclusion of this information in an advertisement for a job, promotion, or transfer opportunity.

The Regulations Should Make Clear that DOL Will Investigate Violations Reported by Organizations and Members of the Public.

Under § 194-2.4 on enforcement, the regulations state that for the purposes of filing a complaint “any person aggrieved by a violation means “a current, prospective, or potential employee or applicant who claims to be aggrieved by a violation, or an organization acting on such person’s behalf[.]” When we drafted and advocated for this language, it was purposefully drafted to be broadly construed to allow members of the general public and organizations (acting on their own behalf) to file complaints to enforce the law. This was based on the perspective that any person or organization who discovers a job advertisement without a compensation range can be aggrieved. We therefore ask that the regulations clarify that any member of the public or an organization acting on its own behalf can report a violation of the law and that such reports or complaints will be investigated by the Department.

Comments in Support with Recommendations to Strengthen Guidance

We appreciate the consultations and effort the Department has dedicated to developing a strong set of regulations to advance meaningful implementation of New York State's law on Pay Transparency in Job Advertisements. Overall, the Department's proposed regulations are comprehensive and provide necessary guidance and clarity on the law's applicability that take into account a number of concerns we have raised since the law was enacted. Below are key provisions we support with some recommendations on how to strengthen these provisions further.

- In negotiating the bill language of this law, our team of advocates worked to prevent amendments that would exclude remote work opportunities. In light of these efforts as well as persistent confusion among workers and employers, we thank the Department for making expressly clear that the law applies to remote work in §194-2.1(c).

- We appreciate the Department's reminder under §194-2.1(e) that temporary help firms must still abide by applicable department guidelines and legal requirements for Notice and Acknowledgment of Wage Rates. The exclusion of temporary help firms in the law remains a concern in light of the fact that such firms are known to engage in exploitative recruitment and retention practices that lack transparency and to disproportionately work with vulnerable workers, including women, people of color, and immigrants. It is therefore critical to ensure that temp workers are protected and temp agencies are held accountable to comply with existing protections.
- We strongly support the Department's inclusion in §194-2.2(a) of a broad definition of advertisement, which makes clear that postings in various mediums and formats are covered, including an email to a pool of applicants and printed flyers, either distributed or displayed. This makes clear that the law, as intended, advances transparency across industries and sectors, including lower-wage sectors that traditionally use more informal methods of advertisements, including help wanted signs.
- We also commend the Department for appropriately defining "pool of applicants" under §194-2.2(a) to cover "more than one potential or prospective applicant," which again ensures broad application of the law to any advertisement shared with more than one person, as intended.
- We support the Department's guidance in §194-2.2(b) that advertisements are covered even in circumstances where they are posted through a third-party such as a recruiter or job listing website and that employers must comply regardless of whether they use a third-party recruitment tool. **We recommend that the regulations further clarify that communications from employers and/or third parties, such as recruitment emails, should include pay range information insofar as outreach is conducted to more than one person with respect to the position in question.** This guidance is particularly important in light of reports that law firms and other employers have attempted to circumvent the law by using third-party recruiters to engage in one-on-one outreach to prospective candidates in lieu of creating formal job advertisements.
- Section 194.2.2(d) correctly highlights that employers are not required under this law to post an advertisement to hire, promote, or transfer employees; **however, the regulations should make clear that employers should be mindful of the broad definition of advertisement to ensure compliance since most recruitment methods involving more than one person are likely to fall under the law. Furthermore, individuals solicited through one-on-one recruitment methods should still be empowered under this law to request pay range information directly without fear of retaliation and we encourage the Department to reflect this interpretation in the guidance.**

- We strongly support the Department's interpretation in §194-2.2(e) of the job description requirement under the law, which makes clear that a job description should be included except "in the limited circumstance where the name of the position or title clearly conveys the full extent of the duties required of the position without additional detail." The inclusion of job descriptions serves several critical functions, including providing necessary context to the pay range. **We recommend, however, that the regulations exclude the example of "dishwasher" because of broader concerns about encouraging informality in lower-wage industries that typically suffer from excessive informality known to result in wage theft.** In many of these industries, employers often advertise a job to carry out a targeted function and subsequently expand the employee's duties without increasing their pay. Ultimately, our goal is to encourage these industries to adopt more formal practices of using job descriptions to avoid these abuses and to equip workers in these industries to use those job descriptions to advocate for themselves in scenarios where their work duties are inappropriately expanded without compensation.
- We support the Department's guidance on the term "range of compensation" under §194-2.3(a) that makes clear that the law applies regardless of frequency of payment, and includes piece rate payment. We especially commend the proposed rule for making clear that if an advertisement covers multiple geographic locations or multiple levels of seniority or supervisory authority, then multiple ranges of compensation must be provided. This guidance is critical to prevent employers from posting overbroad salaries that serve to obscure the true range by covering multiple levels in one. We strongly support the guidance in this section for making clear that employers should not list other forms of compensation in a way that obscures the base rate of pay.
- We commend the Department for including an illustrative example under §194-2.3(f)(2)(ii) that demonstrates that the use of overly broad ranges that lack valid explanation constitutes bad faith under the law. **We would further recommend that the regulations make clear that to meet the "good faith" requirement any "further information" in a posting designed to explain the range must include specific and objective factors to justify the breadth in the range.**

A key priority in implementing New York State's pay transparency law is to ensure that employers cannot carve out loopholes that ultimately undermine transparency and its role in achieving pay equity. Towards this end, we hope the Department will revise the proposed regulations to eliminate problematic loopholes that risk drastically undermining this important law and consider our broader recommendations on how to strengthen and support compliance.

We commend the Department for otherwise developing proposed regulations that provide thoughtful and necessary guidance to enhance clarity and compliance and thank the Department for its dedication to wage equity and appreciate your consideration of our comments.

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